

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JUNE 27, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-3093

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ALBIN E. BARTOSZ,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Reversed and cause remanded.*

MYSE, J. Albin Bartosz appeals a summary judgment concluding that a structure he built in the waters of Scattering Rice Lake was not a pier and an order requiring that he remove the structure and pay a forfeiture of \$297. Bartosz contends that the trial court erred by concluding that because his structure was outfitted with a roof that functioned as an observation/sun deck, the structure was not a pier and therefore, required a permit under § 30.12, STATS. Alternatively, Bartosz contends that because his structure has been the subject of three previous enforcement actions by the State, the instant action is barred under the doctrine of claim preclusion. Because this court concludes that: (1) there is a disputed issue of material fact as to whether Bartosz's structure was a pier as that term is defined by § 30.01(5), STATS.; and (2) claim preclusion does not preclude the instant action, this court

reverses the trial court's grant of summary judgment and order of removal and remands for an evidentiary hearing.

Albin Bartosz owns a home on Scattering Rice Lake, located in Vilas County, Wisconsin. In 1985, Bartosz retained a contractor to build a structure intruding into the lake. The structure consists of a pier with two slips for the berthing of watercraft and is partially covered by a roof. The top of the roof is carpeted, surrounded by a handrail and has lights, seating and a grill. The roof functions as a deck and is used for sunbathing, observation and other social activities. After the Bartosz structure was completed, the DNR issued two citations to Bartosz for constructing an illegal structure on the bed of Scattering Rice Lake. For reasons that do not appear in the record, the citations were ultimately dismissed.

In 1989, Bartosz was issued a third citation for placing a structure on a navigable waterway without a permit in violation of § 30.15(1)(d), STATS. Bartosz stipulated to a no contest plea and paid a fine of \$86. Three years later, in 1992, the DNR sent a letter to Bartosz informing him that his structure was not in compliance with the administrative code. Accordingly, the DNR requested Bartosz to remove his structure by September 1, 1992. Bartosz refused the DNR's request. Thereafter, in the spring of 1994, Bartosz was again issued a citation for placing a structure in a navigable waterway without a permit, contrary to § 30.15(1)(d). Similar citations were also issued to Koch and a third neighbor, Allen Schroeder.

The cases were subsequently consolidated for trial purposes and all three defendants filed motions to dismiss. At the hearing on the motions, Bartosz argued that at the time his structure was built, it satisfied the requirements of a pier under § 30.01(5), STATS. Therefore, under § 30.13, STATS., Bartosz argued that he was not required to obtain a permit for his structure. The trial court, however, concluded that Bartosz's structure did not satisfy the requirements of a pier. The court found that because the roof of the structure could be used as an observation/sun deck, the "significant purpose" of the structure was not the berthing of watercraft. As a result, the court concluded that Bartosz's structure required a permit and granted summary judgment in favor of the State. The court then entered an order requiring Bartosz to remove the structure and pay a forfeiture of \$297.

Bartosz contends that the trial court erred by granting summary judgment in favor of the State because his structure satisfied the definition of a "pier" under § 30.01(5), STATS. This court reviews a summary judgment de novo, applying the same methodology as the trial court. See 802.08(2), STATS. Because that methodology is familiar, it need not be repeated here. See *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Resolution of this case requires that this court first determine the meaning of "pier" as that term is defined by § 30.01(5), STATS. This is a question of statutory interpretation that this court reviews de novo without deference to the trial court. *In re J.V.R.*, 127 Wis.2d 192, 199, 378 N.W.2d 266, 269 (1985). The purpose of statutory interpretation is to ascertain and give effect to the legislature's intent. *State ex rel. Dieckhoff v. Severson*, 145 Wis.2d 180, 189, 426 N.W.2d 71, 73 (Ct. App. 1988). If the language of the statute is unambiguous, this court must construe the statute according to its ordinary meaning. *State v. Martin*, 162 Wis.2d 883, 893, 470 N.W.2d 900, 904 (1991).

At the time Bartosz's structure was built in 1985, § 30.01(5), STATS., defined a "pier" as follows: "'Pier' means any structure extending channelward from the shore with water on both sides, built or maintained for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft." The language of this statute is clear and unambiguous. If the structure was built or maintained for the primary purpose of providing a berth for watercraft, the structure is a pier exempt from the permit requirement. See § 30.13, STATS. Thus, a structure need not be used exclusively for the purpose of berthing watercraft to remain within the definition of a "pier." As Bartosz points out, it is often the case that owners of lakefront property will use their piers for purposes other than berthing watercraft. Such uses include sunbathing, barbecuing, socializing, fishing and numerous other activities. Despite the other uses to which piers may be put, however, they retain their status as piers if they were built and maintained for the primary purpose of berthing watercraft. However, where a structure is built and maintained primarily for some other purpose, such as socializing, the structure is precluded from being defined as a pier. This court therefore concludes that the statutory definition of "pier" requires that the primary purpose of the structure be the berthing of watercraft and that any other use of the structure be merely ancillary to that purpose.

The dispositive issue on appeal is whether Bartosz built and maintained his structure primarily for the purpose of berthing watercraft. In this case, the trial court concluded as a matter of law that Bartosz's structure was not a "pier" under § 30.01(5), STATS. This court, however, concludes that a determination of the primary purpose of Bartosz's structure raises a disputed issue of material fact that must be resolved by an evidentiary hearing. The roof covering the boatslips permits the structure to be used for a variety of activities, including, but not limited to, sunbathing, observation and socializing. However, the structure also permits the berthing of two watercraft. Thus, the primary purpose for which the structure was built and maintained depends upon questions of intent, state of mind and usage. These are questions of fact that require an evidentiary hearing. *State v. Lossman*, 118 Wis.2d 526, 543, 348 N.W.2d 159, 167 (1984). Accordingly, this court reverses the trial court's grant of summary judgment to the State and remands for an evidentiary hearing on this issue. If the evidence on remand demonstrates that Bartosz built and maintained the structure for the primary purpose of berthing watercraft, the structure is a "pier" and does not require a permit. However, if the evidence reveals that the berthing of watercraft was an ancillary purpose, the trial court may order that sanction which it deems appropriate.¹

Bartosz next contends that the trial court erred by failing to conclude that the instant action is barred under the doctrine of claim preclusion. Under the doctrine of claim preclusion, a final judgment on the merits bars further litigation between the same parties, or their privies, on all matters arising out of the transaction that were or might have been litigated in the earlier proceeding. *Great Lakes Trucking Co. v. Black*, 165 Wis.2d 162, 168, 477 N.W.2d 65, 67 (Ct. App. 1991). Whether claim preclusion applies under a given set of facts is a question of law. *Id.*

Bartosz argues that prior to this action, the DNR instituted three separate enforcement actions against him for building a structure on a navigable waterway without a permit. The first two actions were dismissed, and the third resulted in a plea of no contest and a fine of \$86. Bartosz now

¹ In his brief, Bartosz raises the issue whether the trial court erred by ordering the complete removal of his structure when the court found that only a portion of the structure was improperly built without a permit. Because this issue was not raised before the trial court, we decline to address it here. We note, however, that Bartosz may litigate this issue on remand.

contends that because the State had the opportunity to seek removal of his structure as a remedy in the previous enforcement actions, but failed to do so, the instant action is precluded under the doctrine of claim preclusion. This argument is without merit for two reasons.

First, the State's three previous enforcement actions against Bartosz are irrelevant to the present case. Section 30.15(3), STATS., provides that "[e]ach day during which an obstruction, deposit or structure exists in violation of sub. (1) is a separate offense." Thus, assuming that Bartosz's structure was improperly built without a permit, each day that it remained in existence after its construction constituted a separate offense for which the State could institute a separate enforcement action.

Second, claim preclusion is only applicable where there has been a final judgment on the merits. Here, the first two enforcement actions against Bartosz were dismissed and therefore were not resolved on their merits. The third action, which resulted in a no contest plea, was resolved on its merits, but was resolved against Bartosz. Accordingly, this court concludes that the trial court properly determined that claim preclusion did not bar the present action.

By the Court.— Judgment and order reversed and cause remanded.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.